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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 586

TORA UPSTEAD RYSTAD,
Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Tora Upstead Rystad respectfully petitions for a rehearing of the order of January 6, 1958, denying her petition for a writ of certiorari to the the Court of Appeals for the Ninth Circuit.

STATEMENT AND JURISDICTION.

On October 3, 1957, there was filed pursuant to 28 U.S.C. 1254(1) a petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit. On January 6, 1958, this Court denied that petition. This petition for rehearing is filed pursuant to Rule 58(2) of the Rules of the Supreme Court of the United States. The grounds upon which it is based are that there exist intervening circumstances of a substantial or controlling effect, and that there are substantial grounds available to petitioner for granting the petition which were not previously presented.

REASONS FOR GRANTING THE REHEARING AND THE PETITION.

1. SINCE THE DENIAL OF THE PETITION HEREIN, THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS DECIDED ONE OF THE QUESTIONS PRESENTED IN A MANNER WHICH IS IN DIRECT CONFLICT WITH THE DECISION BELOW.

Among the questions presented by the petition herein was whether the government should have produced, pursuant to petitioner's demand, the written reports concerning her made by the sole witness against her—a paid informer for the Federal Bureau of Investigation. Petitioner contended that the decision of this Court in *Jencks v. United States*, 353 U.S. 657, required the production of such reports. The government argued that *Jencks* was limited to criminal proceedings and that administrative proceedings need

not follow "judicial rules of evidence" (Br. in Op. 13-14).

Since the order denying certiorari herein, the Court of Appeals for the District of Columbia has specifically rejected the government's contention (*Communist Party v. Subversive Activities Control Board*, C.A. D.C., No. 11,850, January 9, 1958). In that case the Court reversed the Board's order upon the sole ground that the government had failed to produce the reports of an F.B.I. informer-witness.

In the case at bar, as in the one in the District of Columbia, it has been established that the witness did make contemporaneous reports which dealt with the very subject matter of his testimony; that his credibility is under the most serious attack; and that without his testimony the order could not stand. Under these circumstances, the holding in the *Communist Party* case that production is "one of the fundamentals of fair play required in an administrative proceeding" is governing here In the *Communist Party* case, the Court said:

> "We hold that, where the Government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the Government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the Government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case, as we read it,

> is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result."

To say that the government is required to produce reports in a criminal proceeding which may result only in the imposition of a fine or a short term of imprisonment, or in an administrative proceeding which will result at most in an order to "register", but that it need not produce such reports in a deportation proceeding despite the "dire consequences" (Br. in Op. 13) attendant upon the latter, is to exalt form over substance and to ignore the realities of the situation presented in the case at bar.

If the government accepts the *Communist Party* decision, it can hardly claim that the rule of that case does not apply to a deportation proceeding. If the government expects to seek review of that decision, it cannot in good conscience now oppose petitioner's effort to obtain review of the self-same issue in her case.

The decision of the Court of Appeals in the *Communist Party* case directly conflicts with the holding below, and to resolve that conflict (which came into being after the denial of certiorari herein[1]), as well as to decide the important question of the applicability of *Jencks* to administrative proceedings (or at least

[1]The decision in the *Communist Party* case is a further "significant change in the law" (Br. in Op. 12) or "supervening event" (*Blair v. Commissioner*, 300 U.S. 5; *United States v. South-Eastern Underwriters Association*, 322 U.S. 533) which precludes the utilization of the first District Court proceeding as a bar here.

to deportation proceedings), the writ of certiorari should now be granted here.

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2. THE DECISION OF THIS COURT IN ROWOLDT v. PERFETTO, NO. 5, O.T. 1957, RENDERED AFTER THE PETITION HEREIN WAS FILED, REQUIRES THAT THE JUDGMENT BELOW BE REVERSED.

This Court held on December 9, 1957, two months after the petition herein was filed, that in order to constitute grounds for deportation an alien's association with the Communist Party had to be "meaningful" and his affiliation had to have " 'political' implications". *Rowoldt v. Perfetto,* No. 5, O.T. 1957. This must mean that the government is required to prove by "reasonable, substantial and probative evidence" (8 U.S.C. 1252[b][4]) something more than mere membership. We need not consider the nature or character of the additional proof thus required since none was offered in the instant case. There is nothing in the record concerning the nature of petitioner's alleged association with the Communist Party or the implications of her alleged affiliation with it. This case is indeed weaker than was *Rowoldt,* and on the basis of *Rowoldt* the judgment below should have been summarily reversed.

Here the government itself concedes that petitioner "was not one of the more active members" (Br. in Op. 17). Indeed, it never suggests that she was anything more than a nominal member, nor does it undertake to demonstrate that her associations were

"meaningful" or had "'political' implications". No findings adverse to petitioner on these issues were made at any stage of the proceedings below, nor would such findings have been supported by the record had they been made.

Although the *Rowoldt* case was pending when the petition herein was filed, it had not yet been decided and the argument here made was not then available to petitioner.

CONCLUSION.

For the foregoing reasons, this petition for rehearing should be granted, the writ of certiorari issued,[2] and the judgment below reversed.

Dated, San Francisco, California,
January 1958.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

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[2]On December 16, 1957, this Court granted certiorari in *Bonetti v. Brownell*, No. 94, O.T. 1957, in which the question of the constitutionality of the statute here involved is raised. This must mean that questions of constitutionality are still open. Petitioner therefore wishes to present as an added issue in the event rehearing is granted, the constitutionality of the statute on its face and as applied to her on the instant record.

Certificate of Counsel.

Norman Leonard hereby certifies that he is a member of the Bar of the Supreme Court of the United States, and counsel for the petitioner herein; that the within petition is presented in good faith and not for delay, and that the said petition is restricted to the grounds that there have occurred, since the denial of the petition for writ of certiorari herein, intervening circumstances of substantial or controlling effect and that there have become available, since the said petition was filed, substantial grounds which were not previously presented.

Norman Leonard.